84-1028

Office-Supreme Court, U.S.
FILED
DEC 27 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NEWS PUBLISHING CO.,
d/b/a ROME NEWS TRIBUNE,
Petitioner,

vs.

BRONDON E. DEBERRY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Georgia

---

*ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
& BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

GROZE MURPHY, JR.
SMITH, SHAW, MADDOX,
DAVIDSON & GRAHAM
First National Bank Building
Rome, Georgia 30163
(404) 291-6223

Attorneys for Petitioners

*Counsel of Record

40PP

QUESTION PRESENTED

I. WHETHER, IN LIGHT OF *BOSE v. CONSUMER'S UNION*, THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE WHICH THE GEORGIA APPELLATE COURTS ERRONEOUSLY HELD TO SUPPORT A FINDING OF ACTUAL MALICE.

---

* Pursuant to Supreme Court Rule 21.1(b) the following were parties to the proceedings below:

Brondon E. DeBerry
News Publishing Company
d/b/a Rome News Tribune

INDEX

	Page
Opinions Below	1
Jurisdictional Statement	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Argument:	4
IN LIGHT OF *BOSE v. CONSUMER'S UNION*, THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE WHICH THE GEORGIA APPELLATE COURTS ERRONEOUSLY HELD TO SUPPORT A FINDING OF ACTUAL MALICE.	
I. THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE OF ACTUAL MALICE.	4
II. THE RECORD IS TOTALLY LACKING IN CLEAR AND CONVINCING EVIDENCE OF RECKLESS DISREGARD FOR THE TRUTH OR KNOWLEDGE OF FALSITY AT THE TIME OF PUBLICATION	7
Conclusion	14

TABLE OF APPENDICES

APPENDIX A: Newspaper Article entitled "At Floyd Correctional Institution Little Evidence to Show State Probe Was Thorough", as it appeared in the *Rome News Tribune*, on November 12, 1978.

APPENDIX B: Affidavit of Larry Hight.

APPENDIX C: Opinion of the Court of Appeals of Georgia dated July 12, 1984 (Corrected July 27, 1984).

APPENDIX D: Order of the Supreme Court of Georgia denying Petitioner's Motion for Reconsideration of Denial of Certiorari dated October 1, 1984.

TABLE OF CITATIONS

	Page
CASES:	
Alpine Construction Co. v. DeMarris, 358 F.Supp. 422 (N.D.Ill. 1973)	9
Bose Corp. v. Consumers Union of the United States, ____U.S. ____, 80 L.Ed.2d 502 (1984)	*passim*
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	7
Fadell v. Minneapolis Star and Tribune Co., Inc., 425 F.Supp. 1075 (N.D.Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977)	9
Garrison v. Louisiana, 379 U.S. 64 (1964)	7
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	7
Guthrie v. Annabel, 50 Ill.App.2d 969, 365 N.E.2d. 1367 (1977)	8
Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977)	9
Hurley v. Northwest Publications, Inc., 273 F.Supp. 967 (D.Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968)	9
Malerba v. Newsday, Inc., 64 A.D.2d 623, 406 N.Y.S.2d 552 (N.Y.App.Div. 1978)	9
New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966)	9
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	*passim*
Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979)	8
Pauling v. Nat'l Review, Inc., 49 Misc.2d 975, 269 N.Y.S.2d 11 (N.Y.Co. 1966), *aff'd*, 27 A.D. 903, 281 N.Y.S.2d 716 (1st Dep't 1967), *aff'd.*, 22 N.Y.2d 818, 292 N.Y.S.2d 913, 239 N.E.2d 654 (1968)	9

	Page
Reliance Insurance Co. v. Barron's, 442 F.Supp. 1341, (S.D.N.Y. 1977)	8
Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409 (1967)	9
St. Amant v. Thompson, 390 U.S. 727 (1968)	*passim*
Samborsky v. Hearst Corp., 2 Media L. Rep. (BNA) 1638 (D.Md.1977)	9
Time, Inc. v. Pape, 401 U.S. 279 (1971)	13
Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D.Cal. 1977)	9

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NEWS PUBLISHING CO.,
d/b/a ROME NEWS TRIBUNE,
Petitioner,

vs.

BRONDON E. DEBERRY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Georgia

---

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia dated July 12, 1984 (as corrected July 27, 1984) is reproduced in its entirety in Appendix C. The opinion has not yet been published.

JURISDICTIONAL STATEMENT

This libel case was tried in the Superior Court of Floyd County, Georgia. A jury awarded the Plaintiff $75,000 in compensatory damages.

Petitioner appealed the judgment to the Court of Appeals of the State of Georgia. The judgment was affirmed by said Court by an opinion dated July 12, 1984 (as corrected July 27, 1984). (Appendix C).

The Supreme Court of Georgia denied the newspaper's Petition for Certiorari on September 7, 1984. Petitioner's

Motion for Reconsideration was denied on October 1, 1984. (Appendix D).

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a libel action brought by a public official concerning a newspaper article published in the *Rome News Tribune.* (App. A). At the time of publication, Respondent DeBerry was the deputy warden of the Floyd County Correctional Institution which was under investigation by the Georgia Department of Corrections. The jury awarded the plaintiff $75,000 in damages. The Court of Appeals of the State of Georgia affirmed. The Supreme Court of Georgia denied certiorari.

The complaint for libel is based entirely upon a quotation from an affidavit obtained by a Floyd County Commissioner and given to petitioner's reporter. The affidavit stated: "Mr. DeBerry upon seeing Mr. Knowles at the Institution stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." (App. 3a, 2b).

The undisputed evidence adduced at trial revealed the following facts. In 1978 the Department of Corrections for the

State of Georgia initiated an investigation into alleged wrongdoing at the Floyd County Correctional Institution. Floyd County Commissioner, Roy Knowles, notified reporter Nanette Payne that he had information indicating that the State's investigation had been incomplete and that persons with information had not been contacted by the State. Following the conversation with Commissioner Knowles, Wade Hoyt, his attorney, gave the reporter the affidavit of Larry Hight, a former inmate at the Floyd County Correctional Institution. (Appendix B) This affidavit was sworn before and notarized by Attorney Hoyt prior to his giving it to reporter Payne.

Prior to publication, reporter Payne received corroboration for statements in the affidavit from Commissioner Knowles who stated that the affidavit was true and based on his personal experience. With regard to the specific alleged wrong quotation from said affidavit, Commissioner Knowles indicated to the reporter that other people could confirm that Mr. DeBerry in fact made the statement attributed to him.

Larry Hight, the person who gave the affidavit which contained the language complained of by the Respondent, testified at trial that his affidavit was true and correct and that he had in fact heard DeBerry threaten Commissioner Knowles. Further, another withness, Mr. Donald Jones, took the stand and swore at the time of trial that he had heard Mr. DeBerry make the statement complained of.

Finally, at the trial, Commissioner Knowles stated under oath that he had given the reporter a great portion of the information contained in the November 12, 1978 article and that all the matter in said article was a true and correct report of information he collected and passed on to reporter Payne. After looking at the November 12, 1978 article, Mr. Knowles testified that the article correctly depicted the verbal and documented information he gave to the reporter.

In its review of the evidence, the Georgia Court of Appeals determined that the reporter's investigation was inadequate because she had failed to personally interview Mr. Hight, but relied instead upon his sworn affidavit.

The Court concluded:

> Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity which would demonstrate actual malice.

App. at 3c-4c.

ARGUMENT

IN LIGHT OF *BOSE v. CONSUMER'S UNION*, THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE WHICH THE GEORGIA APPELLATE COURTS ERRONEOUSLY HELD TO SUPPORT A FINDING OF ACTUAL MALICE.

I. THIS COURT SHOULD INDEPENDENTLY REVIEW THE EVIDENCE OF ACTUAL MALICE.

Under the rule proclaimed by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumer Union of the United States, Inc.*, ____ U.S. ____, 80 L. Ed.2d 502 (1984), appellate courts have a constitutional duty to independently review the evidence and measure it against the rigorous standards protecting the widest possible freedom of expression.

In *New York Times*, this Court held that appellate courts must make an "independent examination of the whole record" to determine whether plaintiff has produced sufficient evidence to meet the constitutionally required minimum standard for recovery:

> . . . [W]e must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." (Citation omitted.) In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the

> principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Citations omitted.) We must "make an independent examination of the whole record," (citation omitted) so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id., at 284-86

The Court's duty to independently review the entire record under Constitutional rather than ordinary guidelines was strongly reaffirmed in this Court's opinion rendered April 30, 1984, in *Bose*. The issue in *Bose* was whether Rule 52(a), Fed. R. Civ. P., which provides that trial court findings of fact should not be set aside on appeal unless "clearly erroneous," would govern the standard for review of the District Court's finding of "actual malice."

In discussing the actual malice standard, this Court held again that appellate courts are constitutionally required to independently examine the evidence in First Amendment cases:

> For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

____U.S.____, 80 L. Ed.2d at 516.

* * *

> Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.

80 L. Ed.2d at 517.

* * *

> . . . [T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any

> unprotected category within acceptably narrow limits in an effort to insure that protected expression will not be inhibited.

80 L. Ed.2d at 519.

* * *

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

80 L. Ed.2d at 523.

Even in dissent, Justice Rehnquist expressed the view that independent appellate review was most appropriate in a case tried to a jury in a state court.

> The Court correctly points out that in *New York Times v. Sullivan, supra,* we conducted independent appellate review of the facts underlying the "actual malice" determination. It is notable, however, that *New York Times* came to this Court from a State court after a jury trial, and thus presented the strongest case for independent fact-finding by this Court

80 L. Ed.2d at 528, n.2.

The present appeal is precisely the type of case contemplated by Justice Rehnquist.

Petitioner respectfully requests this Court to exercise the mandate of *New York Times* and *Bose,* and conduct an independent review of the evidence in this Case. A review of the record clearly demonstrates that the Plaintiff has totally failed to establish by "clear and convincing evidence" that Defendant published the article with "actual malice."

II THE RECORD IS TOTALLY LACKING IN CLEAR AND CONVINCING EVIDENCE OF RECKLESS DISREGARD FOR THE TRUTH OR KNOWLEDGE OF FALSITY AT THE TIME OF PUBLICATION.

A review of the evidence in the instant case conclusively shows that, even if the article at issue was false, the article was not published with that "high degree of awareness of . . . probable falsity" which is required to establish liability.

Plaintiff was required to prove by clear and convincing evidence that the authors knew the article was false or published with reckless disregard for whether it was true or false. *New York Times Co. v. Sullivan, supra.* There is no evidence that it was published with a "high degree of awareness of its probable falsity" or that the Defendants in fact entertained serious doubts as to truth as required by *St. Amant v. Thompson*, 390 U.S. 727 (1968). See Also, *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964). This Court summarized the meaning of "reckless disregard" in *St. Amant v. Thompson, supra*, as follows:

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), stated that evidence of either deliberate falsification or

> reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonable prudent man would have published, *or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice (emphasis added).

Id., 390 U.S. at 730-31.

This Court's ruling in *St. Amant V. Thompson, supra,* identified the following evidence that may be employed to attempt to establish "actual malice":

1. The communication has been fabricated by the defendant;

2. It is the product of the defendant's imagination;

3. It is based wholly on an unverified anonymous telephone call;

4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;

5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

It is undisputed that mere failure to investigate does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that mistakes in interpreting events or documents do not evidence the necessary state of mind. *Time, Inv. v. Pape,* 401 U.S. 279 (1971); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co. v. Barron's,* 442 F.Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie v. Annabel,* 50 Ill. App. 3d 969, 365 N.E. 2d 1367, 3 Media L.

Rep. (BNA) 1152 (1977); *Rose v. Koch*, 278 Minn. 235, 154 N.W. 2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant v. Thompson, supra*, at 733. Defendants have been held to be free of "actual malice" despite a general failure to investigate, *Id.*, failure to talk to the plaintiff before publication,[1] failure to verify information,[2] publication of material incapable of verification,[3] failure to discover that published material relied upon had later been retracted,[4] and failure to discover contradictory material in the defendant's files but not at the time of publication actually known to the defendant's employees responsible for the particular publication.[5]

---

[1] *Hurley v. Northwest Publications, Inc.*, 273 F.Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Malerba v. Newsday, Inc.*, 64 A.D.2d 623, 406 N.Y.S.2d 552, 4 Media L. Rep. (BNA) 1110, (N.Y. App. Div. 1978).

[2] *Samborsky v. Hearst Corp.*, 2 Media L. Rep. (BNA) 1638 (D. Md. 1977); *Fadell v. Minneapolis Star and Tribune Co., Inc.*, 425 F.Supp. 1075, 2 Media Rep. (BNA) 1961 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107, 2 Media L. Rep. 2198 (BNA) (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

"While verification of the facts remains an important reporting standard, a reporter, without a high degree of awareness of their probable falsity', may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co. v. Connors*, 365 F.2d 567, 576 (5th Cir. 1966).

[3] *Hotchner v. Castillo-Puche*, 551 F.2d 910, 2 Media L. Rep. (BNA) 1545; (2d Cir. 1977), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

[4] *Alpine Construction Co. v. DeMaris*, 358 F.Supp. 422 (N.D. Ill. 1973).

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964); *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814, 2 Media L. Rep. (BNA) 1334, (N.D. Cal. 1977); *Pauling v. Nat'l. Review, Inc.*, 49 Misc. 2d 975, 269 N.Y.S.2d 11 (N.Y. Co. 1966), *aff'd*, 27 A.D. 903, 281 N.Y.S.2d 716 (1st Dep't 1967), *aff'd*, 22 N.Y.2d 818, 292 N.Y.S.2d 913, 239 N.E.2d 654 (1968).

The only evidence of a reckless or knowing state of mind cited by the court below is the defendant's failure to pursue further her investigation. The decisional authorities of this Court unequivocally hold that such evidence can never rise to the level of "clear and convincing" proof of reckless or knowing falsehood.

It is evident from the undisputed facts that the article was published as a result of charges by Commissioner Knowles (the public official charged with overseeing the conduct of the correctional institution), accusing Deputy Warden DeBerry of misconduct. Defendant was entitled to rely upon the statements of this responsible public official for the truth of the allegations against Mr. DeBerry. In addition, the newspaper had seen the sworn affidavit of former inmate Hight, (App. B) and had no reason whatever to doubt the veracity of his statements. Mr. Hight affirmed the truth of his affidavit in sworn testimony at trial below. Accordingly, there is no reason whatever to assume, as the Court below did, that further investigation would have led the newspaper to the conclusion that Hight was not telling the truth.

The opinion of the Georgia Court of Appeals relies exclusively on the newspaper's failure to investigate in determining that clear and convincing evidence of actual malice existed. The Court's opinion states:

> Before the article was published, no one connected with appellant's newspaper had seen Hight or talked with him either by telephone or in person. No one talked with anyone at the correctional institution or anyone else regarding Hight's reputation for reliability or truthfullness. No one checked Hight's criminal record. No one could remember any effort to ascertain from Knowles the names of the other individuals whom Knowles said could corroborate Hight's accusation. Payne and the appellant had no source other than Hight's affidavit and Knowles for the charge. Payne had no knowledge of when the threat was supposed to have been made.

> Thus, the evidence adduced provides clear and convincing evidence that obvious reasons existed for the appellant to doubt the veracity of the informant and the accuracy of his information.

App. at 3c.

The Court then concludes:

> *Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity* which would demonstrate actual malice. The trial court did not err in denying appellant's motions for directed verdict and j.n.o.v. (emphasis added).

App. at 3c-4c.

The conclusion reached by the court below is contrary to the rule enunciated in *St. Amant, supra*, and should be reversed by this Court.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, *or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication (emphasis added).

St. Amant v. Thompson, 390 U.S. 731. At the time of publication, the newspaper had absolutely no reason to doubt the truthfulness of Mr. Hight's affidavit, supported as it was by Commissioner Knowles.

The ruling of the Court of Appeals of the State of Georgia is so clearly contrary to the decisions of this Court that it cannot be permitted to stand.

Moreover, a reading of the *article itself* discloses that the defendant did not act with actual malice. It is clear from the text of the article that its purpose was to inform the public of certain questions that had been raised regarding the completeness and thoroughness of the State's investigation into managerial misconduct at the Floyd County Correctional Institution. It is obvious that the article was not designed to

represent any of the statements contained in the affidavits mentioned therein as being undisputed fact, but rather to simply point out that these statements had been made and sworn to by inmates and guards but had never been investigated. Regarding Mr. DeBerry, the November 12th article merely reported the existence of an affidavit by a correctional institute inmate (Hight) in which the inmate swore that DeBerry had ordered him to call Commissioner Knowles and ask Knowles to come to the facility so he (DeBerry) could refuse Knowles admittance. The article also reported that the inmate swore that he had overheard DeBerry say that he (DeBerry) was going to to "kill Knowles or have it done." Immediately after this portion of the article (which is the only part of the article regarding Mr. DeBerry) the article goes on to describe, in detail, DeBerry's version of this incident:

> "After State Corrections officials orally exonorated Rome C.I. officials of any wrongdoing at the facility, DeBerry in an interview with newsmen, said an inmate had 'lured Knowles' to the facility as part of a plot to 'harm' the Commisisoner, which is why Knowles was refused admittance to the facility by DeBerry."

At no place in the article is there any assertion or representation that the contents of the inmate's affidavit is undisputed fact. The existence of Mr. Hight's affidavit and its contents were reported only to point out that a former inmate who had made allegations about Mr. DeBerry and his conduct at the Correctional Institution had never been questioned by State investigators during the course of their investigation. The only thing reported in the article as an undisputed fact was the *existence* of the affidavit and the *failure* of the State's investigators to question the affiant, Mr. Hight. It is clear that the thrust of the article concerned the thoroughness (or lack of thoroughness) of the State's investigation. This is particularly obvious in light of the fact that the article also included Mr. DeBerry's version of the incident. The defendant simply published a news story which recites the fact that an inmate had made sworn statements about Mr. DeBerry's official conduct and that the inmate was never questioned about the statements by any of the State's

investigators. The Respondent cannot dispute the existence of the affidavit or the fact that the affidavit contained everything defendant's article reported that it contained. (Appendix B). This being the case, it is clear from reading the *article itself* that the defendant *coult not have acted* with the high degree of awareness of probable falsity required by the decisions of this Court.

From the foregoing, it is clear that the article, by its very nature, is "descriptive of what somebody *said*, not what somebody *did.*" *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1971) (emphasis in original). As an accurate verbatim quotation of an affidavit in the custody of Commissioner Knowles, the article is constitutionally privileged and must be deemed to have been published without malice as a matter of law.

CONCLUSION

For all the reasons stated above, we respectfully urge this Court to follow the mandate set forth in *Bose* and independently review the evidence on the issue of actual malice.

Respectfully submitted,

*ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
& BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

GROZE MURPHY, JR.
SMITH, SHAW, MADDOX,
DAVIDSON & GRAHAM
First National Bank Building
Rome, Georgia 30163
(404) 291-6223

Attorneys for Petitioners

*Counsel of Record

APPENDIX A

At Floyd Correctional Institution

Little evidence to show state probe was thorough

BY NANETTE PAYNE AND DAVID ROYAL
News-Tribune Staff Writers

If Floyd County Commissioner Roy Knowles wanted a complete and thorough investigation of the Correctional Institution (CI), there is little evidence to suggest he got one, according to documents and sworn affidavits obtained by the News-Tribune.

The probe report, given orally by state corrections officials, failed to take into account information obtained by the News-Tribune indicating that an inmate at the facility was transferred out simply because he was seen "talking to" Commissioner Knowles, that Knowles was "lured" to the CI by an inmate on instructions of Deputy Warden Brondon DeBerry then denied admittance, and that at least one CI guard Knowles requested the state to interview in the course of its investigation was not contacted about information he wished to disclose.

The correctional officer, Doug Johnson, River Creek Rt. 2, said in an affidavit he was ignored by state officials in the probe and claims to have information pertinent to the probe.

"I indicated to Mr. Knowles my willingness to discuss events at the Floyd County Correctional Institution with any representatives of the Georgia Department of Corrections. I feel I have information which might be relevant and helpful in said investigation.

"As of the date of this affidavit (Oct. 26, 1978) I have not been contacted by any representatives of the Department of Corrections including but not limited to Jack Kreps nor do I know of any other guards who discussed anything with representatives of the State Department of Corrections," his affidavit reads.

Johnson was recently suspended by the CI for 14 days for allegedly having work done on his private vehicle by inmates during off-work hours. He subsequently resigned.

The state probe

The state probe stemmed from some 50 allegations relayed by Knowles who said they came from inmates and guards at the facility. Knowles had requested the state officials probe the matter and then furnished a list of people he wanted the state to contact.

In addition to the list, Knowles said he orally asked the officials to contact Johnson and another guard, Sandy Quick, who has since been dismissed from the CI.

The state corrections officials have declined to tell News-Tribune reporters which of the allegations they probed, who they contacted in connection with it, or who even conducted the investigation with the exception of Kreps who said he and a co-worker were involved in the probe. Kreps is the district director for the Northern Division of the Department of Offender Rehabilitation.

The News-Tribune has been unable to contact Quick but did obtain Johnson's affidavit.

Disciplinary action

Johnson was suspended as disciplinary action for allegedly having prisoners work on his personal vehicle after regular hours despite the fact that only two days before his suspension, the September Term Floyd County Grand Jury said such work was not in violation of any state laws.

The suspension notification also charged that Johnson left the CI premises during working hours without permission.

The Grand Jury findings, however, was in apparent reference to reports published in the News-Tribune in June that then-acting Warden Robert Thacker had work performed on his personal vehicle by off-duty inmates.

Thacker was quoted at the time as saying that inmates would not be allowed to accept jobs from the public but personal work had been limited to only those employees who work in the vicinity of the CI and who are in contact with the inmates occassionally during the day.

Knowles 'lured' to CI

A former CI inmate, who requested his name be withheld for fear of reprisals, in a sworn affidavit obtained by the News-Tribune, said he was told by CI Deputy Warden Brondon DeBerry, to call Commissioner Knowles and ask him to come to the facility.

"I was told not to gvie my name to Mr. Knowles but simply ask him to come to the institution to talk to me about the problems at the institution.

"Mr. DeBerry told me that he wanted to get Mr. Knowles to the institution so he, Mr. DeBerry, could refuse Mr. Knowles entry into the institution," the former inmate's affidavit reads.

The inmate said at that time he knew of no plot to hurt Mr. Knowles by any of the inmates, nor had I even heard of such a plot by any of the inmates."

On that occasion, the inmate swears, "Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done."

The inmate said he conveyed that information to Knowles and asked that the matter be investigated and "I know of other individuals, both prisoners and guards, who have also asked Mr. Knowles to investigate the Floyd County Correctional Institution.

As of the date (Oct. 26, 1978), I have not been contacted by any representatives of the Georgia State Department of Corrections nor of any Floyd County grand jury," the inmate avers.

After state corrections officials orally exonerated Rome CI officials of any wrong-doing at the facility, DeBerry, in an interview with newsmen, said an inmate had "lured" Knowles to the facility as part of a plot to "harm" the commissioner, which is why Knowles was refused admittance to the facility by DeBerry.

Inmate transferred

Included in documents turned over to the state corrections officials is the transfer and work records of a former CI inmate

whose discussions with Knowles at the facility prompted his transfer to a medium security prison from the minimum security CI according to official county records.

A Floyd CI Transfer Recommendation notes, "This inmate (Donald Jones) is from Floyd County and is closely associated with one of the county commissioners here. This commissioner comes over to the rock crusher where the inmate works on his detail and is constantly talking to the inmate, asking him questions about business pertaining to the Correctional Institution. This inmate has other inmates convinced that if they have any problems, instead of coming to the staff at the C.I., they can just come to him and he will get the commissioner to do something about it. We feel that it will be better for all concerned if the inmate we (sic) transferred to another institution as soon as possible."

When qestioned, Knowles said his only conversation with Jones involved a request by the inmate that Knowles write a letter to state corrections officials recommending an early parole for the prisoner.

Work records of Jones' obtained by the News-Tribune shows an exemplary inmate was transferred from the facility.

Jones received "excellent" ratings from CI superiors for the months of April, May and June (the transfer order was issued June 26), with recommendations for special privileges.

"This man continually works extra hours at the rock crusher on week nights and on the weekends whenver he is needed. Does a fine job . . . . He should be given a special privilege," his June performance report reads.

Knowles said the inmate requested the recommendation for early parole as he was apparently told that was what the state would need to grant such a release.

Included in documents taken to the state corrections officials by Knowles and Rome Attorney Ron Patton in August were letters from a CI inmate and a county employee alleging improprieties at the facility.

Allegations of prisoner harrassment and beatings are contained in the two letters given the state.

Rome News-Tribune

APPENDIX B

GEORGIA, FLOYD COUNTY:

Now comes *LARRY HIGHT* before the below signed Notary Public and makes this Affidavit on his own personal knowledge and belief and for use in evidence in the continuing investigation of the Floyd County Correctional Institution:

1.

My name is *LARRY HIGHT* and I reside at 408 E. 9th St., *Rome, Georgia* and my occupation at this time is *construction worker.*

2.

I was a prisoner at the Floyd County Correctional Institution from March 13, 1978 to Sept. 4, 1978.

3.

I was told to call Roy Knowles by Bondon DeBerry, the Assistant Warden of the Floyd County Correctional Institution. I was told not to give my name to Mr. Knowles, but simply to ask him to come to the Institution to talk to me about the problems at the institution.

4.

Mr. DeBerry told me that he wanted to get Mr. Knowles to the institution so he, Mr. DeBerry, could refuse Mr. Knowles entry into the institution.

5.

At that time I knew of no plot to hurt Mr. Knowles by any of the inmates, nor had I even heard of such a plot by any of the inmates.

6.

I further state that on one occasion at the Floyd County Correctional Institution, Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done.

7.

I conveyed the information contained herein to Mr. Roy Knowles and asked that he have these allegations investigated & I know of other individuals, both prisoners and guards, who have also asked Mr. Knowles to investigate the Floyd County Correctional Institute.

8.

As of this date, I have not been contacted by any representatives of the Ga. State Dept. of Corrections nor of any Floyd Co. Grand Jury.

9.

I certify I have read this affidavit & I affirm its contents this 26th day of Oct., 1978.

Sworn to and subscribed before the undersigned Notary Public this 26th day of October, 1978.

/s/ WADE C. HOYT, III

/s/ LARRY HIGHT

APPENDIX C

JUL 12 1984

67725. NEWS PUBLISHING COMPANY d/b/a ROME NEWS TRIBUNE v. DeBERRY.

POPE, JUDGE. P-24

This appeal comes from a jury verdict in the amount of $75,000 in favor of plaintiff/appellee Brondon E. DeBerry against defendant/appellant News Publishing Company d/b/a Rome News Tribune in an action for libel. On November 12, 1978, the date the article in question was published, DeBerry was deputy warden of the Floyd County Correctional Institution. In the article, the thrust of which was that state investigations of wrongdoing at the correctional institution had not been thorough, the following statement appeared: "Mr. DeBerry, upon seeing Mr. Knowles at the institution stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." At the time of the article, Roy Knowles was a Floyd County commissioner. The statement was attributed in the article to an affidavit given by a former inmate of the correctional institution whose name was withheld for fear of reprisal.

1. Appellant argues that the trial court erred in not granting its motions for directed verdict and for judgment notwithstanding the verdict because DeBerry did not meet his constitutional burden of proof in regard to showing actual malice in the publication of the alleged libel. At the beginning of the trial, the parties stipulated that DeBerry was a public official and would have to prove actual malice in order to recover.

A civil action for libel by a public figure or official against a newspaper requires clear and convincing proof that a defamatory falsehood alleged as libel was published with actual malice; that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Hemenway v. Blanchard*, 163 Ga. App. 668 (1) (294 SE2d 603); Curtis Publishing Co. v. Butts, 388 U.S. 130 (87 SC 1975, 18 LE2d 1094) (1967); New York Times v. Sullivan, 376 U.S. 254 (84 SC 710 11 LE2d 686) (1964). "This heavy burden of proof is necessary to preserve( ) the balance between free debate on

the one hand and compensation of individuals for harm inflicted by defamatory falsehood on the other.' [Cit.] Consistent with the strong societal interest in preserving free debate, an appellate court is required to examine the evidence with careful scrutiny. [Cits.]" *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983). "Absent an admission by the defendant that he knew his material was false or that he doubted its truth, a public figure must rely upon circumstantial evidence to prove his case. [Cit.]" Id. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." St. Amant v. Thompson, 390 U.S. 727, 731 (88 SC 1323, 20 LE2d 262) (1968). "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. . . . [R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732. "[W]hen an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story. . . was grossly indadequate in the circumstances.' [Cits.]" Hunt v. Liberty Lobby, supra at 643.

At trial DeBerry testified that he never made any threat on Knowles' life and that the charge in the article printed in appellant's newspaper was false. He further adduced evidence showing the following. The former inmate referred to in the article was identified as Larry Hight. The article in which appeared the charge that DeBerry had threatened the life of Knowles was in preparation for several weeks and was prepared by two reporters. It was an investigative piece with no set time for publication; appellant's newspaper had reported earlier on the state investigations of the correctional institution. On at least two occasions Knowles had attempted to have the county commissioners remove DeBerry from office but had failed.

The principal reporter for the article in question was Nanette Payne. She testified that she first learned of the charge that DeBerry had threatened Knowles from Knowles himself who told her that he had heard it from other people. Knowles gave Payne Hight's name as one of the individuals who had knowledge of the threats. *Payne attempted to contact Hight by telephone at his job but could never reach him. She left several messages but her calls were never returned.* She knew where Hight worked (in the local area) but never went to his place of employment to talk to him. She did not know where he lived and made no concerted effort to find out. Her impression was that Hight was reluctant to talk to a reporter. She advised Knowles that she could not use the information unless it was substantiated. Knowles arranged for Hight to come to the office of the attorney who represented both Knowles and Hight to sign an affidavit.

Before the article was published, no one connected with appellant's newspaper had seen Hight or talked with him either by telephone or in person. No one talked with anyone at the correctional institution or anyone else regarding Hight's reputation for reliability or truthfulness. No one checked Hight's criminal record. No one could remember any effort to ascertain from Knowles the names of the other individuals whom Knowles said could corroborate Hight's accusation. Payne and the appeallant had no source other than Hight's affidavit and Knowles for the charge. Payne had no knowledge of when the threat was supposed to have been made. Payne never talked with DeBerry regarding the allegations prior to publication of the article.

Thus, the evidence adduced provides clear and convincing evidence that obvious reasons existed for the appellant to doubt the veracity of the informant and the accuracy of his information. Hight was all but anonymous to appellant and its reporters. The fact that Knowles had attempted to have DeBerry fired on two occasions should have put the appellant on notice that Knowles might have bias and would readily give credence to an alleged threat by DeBerry against him. Failure to investigate further in these circumstances was sufficient evidence from which the jury could infer that recklessness in regard to truth or falsity which would demonstrate actual

malice. The trial court did not err in denying appellant's motions for directed verdict and j.n.o.v.

2. Appellant argues that the court erred in admitted the opinion testimony of George Greiff, appellee's expert. Greiff was identified as a professor of journalism at Georgia State University with a 33-year career in newspaper reporting and editing. He testified to certain generally recognized minimum standards in journalism for the reporting of stories and then gave his opinion upon a hypothetical question. Appellant argues that there are no recognized journalistic standards and that Greiff's opinion invaded the province of the jury. We find neither argument persuasive. Greiff merely stated his opinion that the conduct described to him in the hypothetical question did not meet the standards to which he had earlier testified. He expressed no opinion whether the conduct so described would constitute actual malice. The court cautioned the jury before Greiff's testimony about expert testimony in general, and specifically cautioned the jury that Greiff's opinion would not be binding upon them. Therefore, we find no error in the admission of Greiff's testimony. See OCGA § 24-9-67; *Smith v. State,* 247 Ga. 612, 619 (277 SE2d 678) (1981); *King v. Browning,* 246 Ga. 46 (1) (268 SE2d 653) (1980); *Pembrook Management, Inc. v. Cossaboon,* 157 Ga. App. 675 (5) (278 SE2d 100) (1981).

3. Finally, appellant argues that the verdict must be reversed because the trial court incorrectly charged the jury that the burden of proof upon DeBerry was the preponderance of the evidence rather than the standard of clear and convincing proof required in libel cases involving public officials. In its initial charge to the jury, the court inadvertently gave both standards of proof to the jury; however, after this was pointed out by counsel, the court very clearly set out the proper standard in its recharge to the jury. " '(I)f it can be determined that the point at issue was presented in substantially . . . clear and understandable a manner . . . keeping in mind that a jury is a lay audience, there should be no reversal where the language conveys correctly the intent of the law and is so framed as to be applied with understanding to the fact situation.' [Cit.]" *Haynes v. Hoffman,* 164 Ga. App. 236, 237 (296 216) (1982). 216)(1982). An examination of the charge and recharge

shows that taken as a whole the law in regard to the proper burden of proof was amply set out. Nor do we find error in the court's refusal to submit to the jury the special verdict form requested by appellant. The subsmission of a special verdict is within the discretion of the trial court; absent an abuse of that discretion, the court's choice will not be overturned. See OCGA § 9-11-49; *Christiansen v. Robertson*, 139 Ga. App. 423 (5) (228 SE2d 350), revd. on other grounds, 237 Ga. 711 (229 SE2d 472)(1976).

Judgment affirmed. Banke, P. J., and Benham, Jr., concur.

APPENDIX D

Clerk's Office, Supreme Court of Georgia

ATLANTA—Oct 1 1984

DEAR SIR:

The motion for a reconsideration was denied today:

Case No. 41463. *News Publishing Co.* d/b/a *Rome News Tribune v. De Berry*

Yours very truly,
MRS. JOLINE B. WILLIAMS,
Clerk

No. 84-1028

Office - Supreme Court, U.S.
FILED
APR 1 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWS PUBLISHING CO.,
d/b/a ROME NEWS TRIBUNE,

Petitioner,

vs.

BRONDON E. DeBERRY,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER A. FRAZIER
212 East Third Street
P. O. Box 1604
Rome, Georgia 30161
(404) 234 6528

ATTORNEY FOR RESPONDENT
BRONDON E. DeBERRY

INDEX

Page

Table of Citations ii

Opinions Below 1

Jurisdictional Statement 1

Constitutional Provisions Involved 2

Statement of the Case 3

Argument 8

THIS COURT SHOULD NOT INDEPENDENTLY REVIEW THE EVIDENCE UNDER THE AUTHORITY OF *BOSE V. CONSUMERS UNION* BECAUSE THE GEORGIA APPELLATE COURTS CORRECTLY HELD THE EVIDENCE SUPPORTED A FINDING OF ACTUAL MALICE 8

Conclusion 18

Certificate of Service 19

TABLE OF CITATIONS

Page

Cases:

Akins vs. Altus Newspapers, Inc., 609 P.2d 1263 (Okl. 1980) 13

Bose Corp. v. Consumers Union of the United States, ____ U.S. ____, 82 L.Ed.2d 863 (1984) 18

Curtis Publishing Co. vs. Butts, 388 U.S. 130 (1967) 8

Fitzgerald vs. Penthouse, 691 F.2d 666 (4th Cir. 1982) 9, 10

Garrison vs. Louisiana, 379 U.S. 64 (1964) 12

News Publishing Co., d/b/a Rome News Tribune vs. Brondon E. DeBerry, 171 Ga. App. 787 (1984) 1

Pep vs. Newsweek, 553 F. Supp. 1000 (S.D.N.Y. 1983) 9, 10

St. Amant vs. Thompson, 390 U.S. 727 (1968) ..8, 9, 10, 12

Stevens vs. Sun Publishing Co., 240 S.E.2d 812 (S. C. 1978) 13

No. 84-1028

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

NEWS PUBLISHING CO.,
d/b/a ROME NEWS TRIBUNE,

Petitioner,

vs.

BRONDON E. DeBERRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia dated July 12, 1984 (as corrected July 27, 1984) is reproduced in its entirety in Appendix C of Petitioner's brief, *News Publishing Co., d/b/a Rome News Tribune vs. Brondon E. DeBerry*, 171 Ga. App. 787 (1984).

JURISDICTIONAL STATEMENT

This libel case was tried in the Superior Court of Floyd County, Georgia. A jury awarded the Plaintiff $75,000 in compensatory damages.

Petitioner appealed the judgment to the Court of Appeals of the State of Georgia. The judgment was affirmed by that Court in an opinion dated July 12, 1984 (as corrected July 27, 1984). (Appendix C of Petitioner's brief.)

The Supreme Court of Georgia denied the newspaper's Petition for Writ of Certiorari on September 7, 1984. Petitioner's Motion for Reconsideration was denied on October 1, 1984. (Appendix D of Petitioner's brief.)

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

[Petitioner has contoured its Statement of the Case to suggest that the only evidence adduced by Respondent at trial was that Petitioner and its reporters at most had failed to investigate sufficiently before publishing. Petitioner also implies that Respondent's evidence generally failed to satisfy his burden of proving actual malice with convincing clarity. For these reasons, Respondent feels constrained to provide a more detailed recitation of the relevant facts.]

The Respondent, Brondon E. DeBerry, filed suit against the Petitioner, News Publishing Company, d/b/a Rome News-Tribune, alleging he had been libeled by an article published in the Tribune on November 12, 1978.

At the time the article was published, Respondent was Deputy Warden of the Floyd County Correctional Institution. Specifically, Respondent alleged that the article contained a false and defamatory quotation which read: "Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." The article, which was introduced at trial as Plaintiff's Exhibit No. 2, bore the headline: "At Floyd Correctional Institution, Little Evidence to Show State Probe Was Thorough." The quotation, which Respondent contended was libelous, was attributed to "a former C. I. inmate who requested his name be withheld for fear of reprisals." The "former C. I. inmate" was identified as Larry Hight The person whose life was supposedly threatened by Respondent was Roy Knowles, a county commissioner. The "sworn affidavit" of Hight was introduced at trial as Plaintiff's Exhibit No. 4. Both Hight and Knowles were represented by the same attorney, Wade Hoyt, III, from whom Petitioner's reporter, Nanette Payne, obtained "the sworn

affidavit." The article containing the libelous quotation was published after two separate investigations, one conducted by the Georgia Department of Corrections and the other by the Floyd County Grand Jury, had cleared Respondent of any suspicion of misconduct as Deputy Warden (Plaintiff's Exhibit No. 2).

Knowles, who was also being sued by Respondent for having made certain slanderous statements, acknowledged he had been responsible for initiating the investigation of Respondent by the Georgia Department of Corrections. Knowles also admitted that on two occasions prior to the publication of the libelous article by Petitioner he had tried to have Respondent fired as Deputy Warden. However, he was unable to get a second from his fellow commissioners on either occasion. Knowles admitting having told Petitioner he would not have hired Respondent "in the first place," and that "as far as having any likes - - Mr. DeBerry, I have nothing for him."

Hight, on the other hand, was generally known to have a reputation in his community for dishonesty. Both Jim Free, Chief of the Floyd County Police Department, and Bill Riley, at one time Hight's immediate supervisor in the Floyd County Public Works Department, testified they would not believe Hight under oath. Indeed, on one occasion Hight approached Riley and admitted he had lied in his affidavit used by Petitioner. Riley added that Hight had told him he had been given groceries by Knowles "on several occasions" in exchange for information.

On the day before his discharge from the Correctional Institution, Hight stole a paint sprayer belonging to Floyd County and hid it in the trunk of his father's car; when Respondent learned about the theft, he threatened Hight

with criminal prosecution if Hight did not return the paint sprayer which Hight's father did immediately thereafter.

Respondent emphatically denied he ever threatened Knowles' life at any time, and said no representative of Petitioner ever contacted him to get corroboration for or refutation of Hight's accusations. Payne, one of Petitioner's reporters who wrote the story about Respondent, acknowledged the libelous article was "investigative," that it was in preparation for "several weeks," and that there was no pressure to complete it by a particular deadline. Payne wrote the libelous passage based *solely* on an affidavit alleged to have been executed by Hight, and the affidavit was prepared at the request of Petitioner because Hight failed to return a series of phone calls apparently made for the purpose of getting corroboration and elaboration. In fact, Payne had advised Knowles, the person Hight had accused Respondent of having threatened to kill or have killed, that Hight's accusations could not even be published until Petitioner obtained "something substantive from him (Hight)." Moreover, when all efforts to contact Hight personally had failed, Payne concluded "Mr. Hight really was hesitant - - it was my impression he was hesitant to talk to us directly." Prior to publication of the libelous story, Payne never saw Hight, never spoke to Hight, never checked the nature and extent of his criminal record, made no effort to determine why Hight had been in the Floyd County Correctional Institution and made no effort to contact the Respondent. During preparation of the story, Payne was unable to find anyone who could corroborate Hight's accusations, even though Payne contended Knowles had told her there were "several people" who supposedly heard Respondent make the threat against Knowles. However, Payne also testified she could not recall Knowles having given her any names.

Too, Respondent testified he learned during a deposition

taken prior to trial that he (Respondent) was alleged by Hight to have made the threat against Knowles in the general vicinity of a rock crusher outside the correctional institution. However, Respondent added that Hight was assigned to the water department when the threat was supposed to have been made, and that "the water department didn't work around the rock crusher."

Respondent testified he had a conversation with David Royal, another reporter for Petitioner who participated in writing the libelous article, "about two or three weeks *before*" the article was published. He recalled that Royal had said Petitioner did not believe the investigations of Knowles' accusations against Respondent had been "thorough." Referring to criticism by the Grand Jury of Petitioner's coverage of the investigations, Royal told Respondent: "My publisher and editor is (sic) going to prove that that Grand Jury up there were wrong . . . They'll walk over you like you didn't exist. They're going to prove that that Grand Jury was wrong." Petitioner never denied Royal made the statement.

Coleman Prophett, an editor for Petitioner at the time the libelous article was published, acknowledged he had read the Grand Jury's presentments criticizing Petitioner and they (presentments) "probably aggravated me . . . If they said that at the time (that they wished the news media would be more accurate), it probably upset me."

Petitioner called Professor George Greiff of Georgia State University's Department of Journalism, who was liberally qualified as an expert on the proper standards to be followed in the preparation of an investigative news story. The gist of Professor Greiff's testimony was that there are generally recognized minimal standards to be followed in the preparation of an investigative news story, and that these standards

include "evaluation of the source" of the information, "seeking statements from other witnesses corroborating the charge," and "being fair to both sides and making every reasonable attempt to get both sides of the story." Moreover, Petitioner did not meet the minimal standards for preparation of an investigative news story, Professor Greiff testified.

Both Payne and Royal corroborated Professor Greiff's testimony. Royal, for example, testified that it is a standard practice in journalism to "get both sides of the story," particularly when someone's integrity is being attacked. He also conceded "it is sound journalistic practice" in preparing an investigative news story "to get corroboration" for a serious charge involving someone's integrity. However, both Royal and Payne acknowledged they made no effort to contact Respondent about Hight's accusations before publication of the libelous article. Too, Prophett acknowledged that "any good reporter. . . tries to substantiate information."

The jury returned a verdict for Respondent in the amount of $75,000.00 in compensatory damages. The Georgia Court of Appeals affirmed, and the Georgia Supreme Court denied certiorari. (See Petitioner's Appendices C and D.)

ARGUMENT

THIS COURT SHOULD NOT INDEPENDENTLY REVIEW THE EVIDENCE UNDER THE AUTHORITY OF *BOSE V. CONSUMERS UNION* BECAUSE THE GEORGIA APPELLATE COURTS CORRECTLY HELD THE EVIDENCE SUPPORTED A FINDING OF ACTUAL MALICE.

In *Curtis Publishing Co. vs. Butts*, 388 U.S. 130 (1967), this Court recognized there are two major categories of news story: (1) the "hot news" story and (2) the "investigative" story (388 U.S. 156, 157, 158). The Court strongly implied the media will be held to a higher standard of accountability when an investigative news story is involved, apparently on the premise that there is little, if any, justification for a lack of thoroughness when the reporter has ample time to research the story fully and carefully. In *Curtis*, the Court expressly approved of the fact that the jury had been instructed to consider "the reliability, the nature of the sources of Defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions" in making a determination of whether the Defendant had published with reckless disregard of the truth or falsity of the story (388 U.S. 156).

In *St. Amant vs. Thompson*, 390 U.S. 727 (1968), this Court was highly instructive in establishing standards by which a publisher could properly be found to have published with actual malice. It noted that the terms "reckless disregard," which is one component of the actual malice rule, "cannot be fully encompassed in one infallible definition. Inevitably, its outer limits will be marked out through case-by-case adjudication . . ." (390 U.S. 730). The Court added: "The Defendant in a defamation action brought by a public official cannot. . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine

whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is . . . based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. " (390 U.S. 732).

Indeed, several recent cases from other jurisdictions have permitted recovery by public figures and public officials upon a showing of actual malice far less compelling than what is involved in the instant case. See, e. g., *Fitzgerald vs. Penthouse*, 691 F.2d 666 (4th Cir. 1982) and *Pep vs. Newsweek*, 553 F. Supp. 1000 (S.D.N.Y. 1983).

In *Fitzgerald*, Penthouse magazine published an article which contained a passage the Court held was capable of being read to accuse Fitzgerald of espionage (691 F.2d 670). The Court discussed at length the primary source of the magazine's article, one Michael Greenwood, and found there were obvious reasons to doubt the veracity of Greenwood and the accuracy of his reports (691 F.2d 671, 672). Moreover, the Court held Penthouse "should have done more than it did to authenticate its source for the publication at issue" and emphasized that no attempt was made to contact Fitzgerald to verify Greenwood's allegations (691 F.2d 671, 672). Accordingly, the Court concluded, Fitzgerald had "presented a factual question as to the reliability of Greenwood" and Penthouse's " 'obvious reason to doubt' the veracity of their informant." On that basis, the Court reversed the entry of summary judgment for Penthouse. In so holding, the Court relied on the cogent language of *St. Amant vs. Thompson*, 390 U.S. 727 (1968), for determining that Fitzgerald had raised a jury question on the

issue of whether Penthouse had published with actual malice as Respondent alleged Petitioner had done in the instant case. In *St. Amant*, the Court said an Appellant in a defamation action brought by a public official would not automatically prevail merely by testifying he believed his story was true, particularly "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (390 U.S. 732).

In *Pep*, Inside Sports, a magazine published by *Newsweek*, ran an article implying that Willie Pep, a former championship boxer, had "fixed" a fight held on February 26, 1954 (553 F. Supp. 1001). The magazine's primary source for the article was one Norman Brett, who was known by Newsweek to be a convicted felon, a compulsive gambler and as a person who had described himself as a "pathological liar" (553 F. Supp. 1001). The Court found there were "obvious reasons to doubt the veracity" of Brett, and because of that "a reasonable jury could find that *Newsweek* employees published with actual malice" (553 F. Supp. 1003). On that basis, the Court denied Appellant's motion for summary judgment (553 F. Supp. 1003).

Of course, there were obvious reasons to doubt the veracity of Larry Hight, Petitioner's only source for the libelous passage of the story about Respondent in the instant case. Indeed, the factors which prompted the Courts to rule as they did in *Fitzgerald* and *Pep* are scattered liberally throughout the record of this case. For example, Payne, one of Petitioner's reporters who wrote the story about Respondent, acknowledged the story was "investigative", that it was in preparation for "several weeks," and that there was no pressure to complete it by a particular deadline. Payne wrote the libelous passage based solely on an affidavit alleged to have been executed by Hight, and the affidavit was prepared at the request of Petitioner because Hight failed to

return a series of phone calls apparently made for the purpose of getting corroboration and elaboration. In fact, Payne had advised former Floyd County Commissioner Roy Knowles, the person Hight had accused Respondent of having threatened to kill or have killed, that Hight's accusations could not even be published until Petitioner obtained "something substantive from him (Hight). Moreover, when all efforts to contact Hight personally had failed, Payne concluded "Mr. Hight really was hesitant - - it was my impression he was hesitant to talk to us directly." Prior to publication of the libelous story about Respondent on November 12, 1978, Payne never saw Hight, never spoke to Hight, never checked the nature and extent of his criminal record, made no effort to determine why Hight had been in the Floyd County Correctional Institution and made no effort to contact Respondent for corroboration or refutation of Hight's accusations. During preparation of the story, Payne was unable to find anyone who could corroborate Hight's accusations, even though Payne contended Knowles had told her there were "several people" who supposedly heard Respondent make the threat against Knowles. Because Payne had made absolutely no personal contact with Hight prior to publication of the story, visually, telephonically or otherwise, because she knew nothing about his criminal record or whether he had any axe to grind with Respondent or whether he had had any "run-ins" with Respondent as an inmate prior to making the accusations against Respondent, and because her only knowledge of Hight came from the affidavit itself, Payne acknowledged on cross-examination that "for all intents and purposes, Larry Hight was just as anonymous to " her as he was to those who read the story. (Hight supposedly asked that his name be withheld from the story, so Petitioner identified him only as "a former C. I. inmate, who requested his name be withheld for fear of reprisals . . .". This is especially significant in view of this

Court's declaration in *St. Amant vs. Thompson*, 390 U.S. 727, 732 (1968), that actual malice could be found where a story is based "wholly on an unverified anonymous telephone call." Unquestionably, Respondent by clear and convincing proof, demonstrated that Petitioner published with actual malice, not only because there were obvious reasons to doubt the veracity of Hight and the credibility of his accusations, but also because reliance on Hight's affidavit, alone, under the circumstances of this case, was tantamount to relying on a wholly unverified anonymous telephone call (390 U.S. 732). It must also be pointed out that Respondent emphatically denied he ever threatened Knowles' life at any time, and that no representative of Petitioner ever contacted him to get corroboration for or refutation of Hight's accusations. Too, Respondent said he learned during a deposition taken prior to trial that he (Respondent) was alleged by Hight to have made the threat against Knowles in the general vicinity of the rock crusher outside the correctional institution. However, Respondent added that Hight was assigned to the water department when the threat was supposed to have been made, and that "the water department didn't work around the rock crusher." Therefore, Hight would not have been where he said he was when the threat was supposed to have been made. Petitioner would have learned that had it bothered to contact Respondent during the preparation of the libelous story. Too, Petitioner would also have learned that on the day before he was discharged from the correctional institution, Hight took a paint sprayer belonging to Floyd County and hid it in the trunk of his father's car, and that when Respondent learned about it, he threatened Hight with criminal prosecution if Hight did not return the paint sprayer which Hight's father did immediately thereafter.

In *Garrison vs. Louisiana*, 379 U.S. 64 (1964), this Court

declared: "[f]ailure to investigate does not *in itself* establish bad faith" (390 U.S. 733). However, the Court clearly did not declare a failure to investigate to be of no importance whatsoever in determining whether an article had been published with actual malice. Rather, a failure to investigate was clearly intended to be one of several factors which the trier of facts could consider in making its determination. This has been recognized by courts in several state jurisdictions. In *Stevens vs. Sun Publishing Co.*, 240 S.E.2d 812 (S. C. 1978), for example, the Court found that the Appellee had published with actual malice, adding that "actual malice is established when reporters and publishers depart from responsible standards of investigation and print articles on the basis of an admittedly unreliable source, without further verification" (240 S.E.2d 815). Too, in *Akins vs. Altus Newspapers, Inc.*, 609 P.2d 1263 (Okl. 1980), the Court found that Appellee had published with actual malice because the evidence showed the Appellee's reporter had made no personal contact with anyone involved in the incident before writing his news story and before its publication (609 P.2d 1266). It is obvious from even the most cursory consideration of the evidence in the instant case that Petitioner made no effort whatsoever to investigate the charges against Respondent, and that it made no personal contact with anyone involved in the incident before writing and publishing the news story and that it departed from responsible standards of investigation and printed the story on the basis of an obviously unreliable source without further verification.

George Greiff, professor of journalism at Georgia State University in Atlanta, testified, after being liberally qualified as an expert, that there are generally recognized minimal

standards to be followed in the preparation of an investigative news story, and that these standards include "evaluation of the source" of the information, "seeking statements from other witnesses corroborating the charge," and "being fair to both sides and making every reasonable attempt to get both sides of the story." Moreover, Petitioner did not meet the minimal standards for preparation of an investigative news story, Professor Greiff testified.

Petitioner's reporters, who prepared the libelous story, and Coleman Prophett, who edited the story, corroborated Professor Greiff's testimony in every significant detail. Reporter David Royal, for example, testified on cross-examination as follows:

> "Q: And isn't it also true, Mr. Royal, that it is a cardinal rule of journalism that when you're doing an investigative story in which you are attacking someone, that you - - you get the other side of the story? You get the - - the point of view of the target of the story, isn't that true?
>
> A: You attempt to get the truth of the matter, as a general rule. If you are attacking a person, you try to get both sides.
>
> Q: All right. In fact, that is the standard practice in journalism, isn't it?
>
> A: That you get both sides of the story?
>
> Q: Yes?
>
> A: Yes, sir." (T-230)

Moreover, Royal and Payne acknowledged they made no effort to contact Respondent about Hight's accusations before publication of the libelous story.

Royal also testified on cross-examination:

"Q: Would you not agree that it is sound journalistic practice, whenever you have an investigative news story which makes such a serious attack on someone else, to try to get corroboration for that particular charge that is being made against someone?

A: Yes, sir." (T-235)

Payne testified on cross-examination as follows:

Q: . . . Ms. Payne, certainly one of the - - of the things that every good journalist tries to do in reporting a story, is to get both sides or all sides whenever possible, isn't that true?

A: That's correct.

Q: In fact, that is a - - a basic, cardinal rule of good journalism to do that, isn't it?

A: Right.

Q: And the reason for that is because you want to present a balanced and as nearly accurate account of whatever it is you're reporting about as you possibly can, isn't that true?

A: Yes.

Q: And, also, because you want to be fair to everyone involved in the story, isn't that true?

A: That's correct. (T-289)

Prophett testified on cross-examination as follows:

Q: . . . And I assume that certainly you require that all of your reporters, that they research a matter fully and completely before putting it into print, is that not true?

A: That's correct.

Q. And one of the primary goals of the News-Tribune insofar as reporting the news . . . is concerned, would be accuracy in its reporting, isn't that true?

A: Certainly, yes, sir.

Q: And also one of your goals . . . would be to be fair to everyone concerned when you're writing a story about that person, isn't that true?

A: That's true.

Q: . . . Even if that story happens to reflect unfavorably on them in some respects?

A: Yes. (T-334)

On direct examination by Petitioner, Prophett acknowledged that "any good reporter, I think, tries to substantiate information," and that among the "general rules" a journalist should follow "in preparing any story" is "to make sure that his information is accurate . . . that it's written clearly for . . . a reader to understand." Too, it was a policy of Petitioner to give a person against whom a serious accusation had been made an opportunity to respond.

As justification for its reliance on nothing more than Hight's affidavit, Petitioner notes that Hight "testified at trial that his affidavit was true and correct, and that he had in fact heard DeBerry threaten Commissioner Knowles. Further, another witness, Mr. Donald Jones, took the stand and swore at the time of trial that he had heard Mr. DeBerry make the statement complained of." (Petitioner's Brief at p. 3.)

However, Petitioner's assertion wholly ignores several critical facts. First, Hight contradicted the wording of the affidavit which he supposedly dictated. After being shown

the document and stating that it had been written verbatim as he dictated it, Hight acknowledged that Respondent had not said what was attributed to him in the affidavit. Rather, Respondent supposedly said: "I'm either going to kill him (Knowles) or have the son of a bitch killed." Hight explained he simply did not tell his lawyer, who wrote the affidavit, that Respondent had referred to Knowles as a "son of a bitch" rather than by his (Knowles') name. Second, Hight conceded Respondent had threatened to charge him with a theft crime after discovering he (Hight) had concealed and hauled away from the correctional institution a paint sprayer which belonged to the government of Floyd County. The theft occurred as Hight was being discharged from the correctional institution. Third, Hight admitted he waited four to six weeks before telling Knowles of the alleged threat; that he (Hight) had not taken the alleged threat seriously; that he had never reported it to the police or to anyone else other than Knowles; that he "didn't care one way or the other" that the alleged threat had supposedly been made; that he had a long criminal record; and that he had been a fugitive for more than two years immediately prior to testifying at trial.

Fourth, the chief of the Floyd County Police Department, Jim Free, and Bill Riley, Hight's former supervisor at the Floyd County Water Department, both testified that Hight was known to be a compulsive liar, and that they would not believe him under oath.

Fifth, Donald Jones, who also supposedly heard the alleged threat, never reported having heard it until just before the time of trial, and admitted he had never been contacted by Petitioner before the time of trial. Jones also revealed he rented a trailer home from Knowles; that he considered Knowles a close friend; that he was very embittered toward Respondent because he blamed Respondent

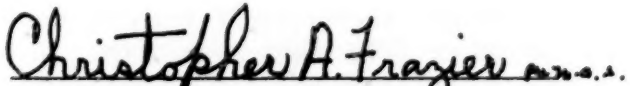
for having had him transferred to a correctional institution outside Floyd County where his family lived; that he , too, had a long criminal record; and that he had a closer relationship with Hight than with any other inmate he knew while in prison.

Thus, it is clear that Respondent presented at trial a surfeit of "clear and convincing evidence" that Petitioner published the offending article with actual malice. It is difficult to imagine a set of facts more cogently and persuasively demonstrating reckless disregard for the truth, and this Court does not need to conduct an independent review of the evidence in this case under the authority of *Bose Corp. v. Consumers Union of the United States*, ____ U.S. ____ , 82 L.Ed.2d 863 (1984).

CONCLUSION

For the reasons set forth in this brief, Respondent respectfully urges this Court to affirm the holdings of the Georgia Court of Appeals and Georgia Supreme Court that the evidence amply supported the jury's finding of actual malice.

Respectfully submitted,



CHRISTOPHER A. FRAZIER
Attorney for Respondent
212 East Third Street
P.O. Box 1604
Rome, Georgia 30161
(404) 234 6528
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am attorney for Respondent in this case, and that I have this day served the within and foregoing Brief of Respondent Brondon E. DeBerry, upon the Petitioner in this case by mailing a copy before filing in a properly addressed envelope with sufficient postage attached to the attorney of record for the Petitioner as follows:

* ARTHUR B. HANSON
ARTHUR D. McKEY
HANSON, O'BRIEN, BIRNEY
& BUTLER
888 Seventeenth Street, N.W.
Washington, D. C. 20006
(202) 298-6161

GROZE MURPHY, JR.
SMITH, SHAW, MADDOX,
DAVIDSON & GRAHAM
First National Bank Building
Rome, Georgia 30163
(404) 291-6223

Attorneys for Petitioners

---

*Counsel of Record

janitorial job in the Housing Department as he had requested. His false arrest suit against defendant city was settled for $105,000.

[ATLA Member Sol E. Goldberg, Southfield, Mich. represented plaintiff.]

NEGLIGENT HIRING: EXTERMINATING COMPANY EMPLOYEE WITH CRIMINAL RECORD: RAPE OF CUSTOMER: SETTLEMENT.

Floeter v. Terminix of Austin, Inc., Tex., Travis County 201st District Court, No. 328,905, Nov. 2, 1982.

$120,000 settlement for the rape of a 32 year-old woman by an employee of defendant exterminating company.

Evidence revealed that defendant's employee had unlocked a window at plaintiff's house while spraying for termites and returned a few nights later to commit the rape. The rapist, who had only been cursorily investigated when he was hired, had been convicted of rape, terroristic threat arising from an attempted rape, and aggravated assault arising from a rape in the 5 1/2 years before he was hired.

ATLA Member Tommy Jacks, Austin, Tex. represented plaintiff.]

NEWSPAPER LIBEL OF PUBLIC OFFICIAL.

Beimel v. Ridgway Publishing Co., Pa., Elk County Court of Common Pleas, No. 80-22, Sept. 21, 1982.

$27,500 jury verdict in favor of plaintiff city commissioner for libel by a local newspaper.

Plaintiff, a city commissioner in Pennsylvania, sought and obtained employment in Idaho following his defeat in a political primary. The local newspaper, owned and operated by defendant, published a front page article about plaintiff entitled "Legal Yes, Ethical No!" The article intimated that plaintiff intended to serve out the balance of his term and collect his salary as commissioner while holding a job and living in another jurisdiction. Plaintiff brought a libel action alleging that the article taken as a whole was false and imported a charge of double-dipping. Expert testimony indicated that the news story, which was based primarily on an anonymous telephone call, violated accepted standards of journalism. The court instructed the jury that plaintiff, as a public official, was required to prove actual malice in order to recover.

[ATLA Member Nicholas F. Lorenzo, Jr., Punxsutawney, Pa. represented plaintiff.]

LANDLORD-TENANT

CONCRETE WALL COLLAPSE: FAILURE TO REPAIR: SPINAL FRACTURE: QUADRIPLEGIA.

Bustillo v. St Paul Insurance Co., Fla., Palm Beach County Circuit Court, No. 812741 CA(L)01D, Sept. 9, 1982.

$3.25 million jury verdict for a 16-year-old girl rendered quadriplegic when a concrete block wall collapsed.

Plaintiff and her mother were tenants of a second-story apartment in defendants' building. Shortly after moving in, plaintiff's mother noted that one of the concrete blocks in a wall which surrounded their porch was loose. She requested repair of the wall and assumed that the repair had taken place. However, defendants took no action to re-

pair the defect and as plaintiff leaned against the wall to speak with a friend in the carport below, two concrete blocks gave way, causing plaintiff to fall to the concrete driveway. Plaintiff sustained a spinal fracture at C-5, rendering her immediately quadriplegic. She brought suit alleging negligent failure to repair a known defect. Defendants contended that plaintiff's mother had not complained about the wall and that they were not aware of a defect. The jury's verdict includes an award of $250,000 to plaintiff's mother for past medical expenses. Plaintiff offered to settle with defendants for their $300,000 insurance policy limits before the verdict, but defendants' insurer did not immediately tender its policy limits. Defendants are now proceeding against their insurer for bad faith refusal to settle the claim.

Plaintiff has limited motion of the shoulders and is confined to a wheelchair. Her future medical care will cost an estimated $80,000 per year.

[ATLA Members Lake Lytal, Jr. and Robert M. Montgomery, Jr., both of West Palm Beach, Fla., represented plaintiff.]

PREMISES

CONSTRUCTION SITE: INADEQUATE SECURITY: SEXUAL ASSAULT IN ADJACENT APARTMENT BUILDING: VISION LOSS: HEMIPARESIS:

Strubing v. Crystal Management, N.Y., New York County Supreme Court, Index No. 20357/79, July 13, 1982.

$3,000,000 jury verdict for a 73-year-old woman who was physically and sexually assaulted in her apartment by an intruder who climbed into her garden from an unsupervised

construction site.

Plaintiff brought suit against defendant landlord and defendant managing agent alleging that their failure to provide sufficient light in the backyard area and their placing of a step ladder in close proximity to her apartment constituted active negligence. Defendants impleaded a construction company which was working on an adjacent lot, alleging that plaintiff's assailant had entered the unguarded construction site and used a construction ladder to climb into plaintiff's backyard. The jury allocated liability 75% to the construction company and 25% to plaintiff's landlord.

APPENDIX A

Office - Supreme Court, U.S.
FILED
APR 27 1985
ALEXANDER L. STEVAS
CLERK

3

No. 84-1028

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NEWS PUBLISHING CO.
d/b/a ROME NEWS TRIBUNE,
Petitioner,

vs.

BRONDON E. DEBERRY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

---

REPLY BRIEF OF PETITIONER

---

*ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
& BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

GROZE MURPHY, JR.
SMITH, SHAW, MADDOX,
DAVIDSON & GRAHAM
First National Bank Building
Rome, Georgia 30163
(404) 291-6223

Attorneys for Petitioner

* Counsel of Record

9PP

INDEX

	Page
Table of Citations	ii
Introduction	1
Argument	2
Conclusion	6

TABLE OF CITATIONS

	Page
Bose Corp. v. Consumers Union of the United States, ____U.S.____, 80 L.Ed.2d 502 (1984)	5,6
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	5
Fitzgerald v. Penthouse International Ltd., 691 F.2d 666 (4th Cir. 1982)	5
Pep v. Newsweek, Inc., 553 F.Supp. 1000 (S.D. N.Y. 1983)	5
St. Amant v. Thompson, 390 U.S. 727 (1968)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NEWS PUBLISHING CO.
d/b/a ROME NEWS TRIBUNE,
Petitioner,

vs.

BRONDON E. DEBERRY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

---

REPLY BRIEF OF PETITIONER

INTRODUCTION

The central question before this Court is whether publication of an allegedly libelous article by a newspaper is Constitutionally protected where it is based upon an investigation conducted by a responsible public official, and is supported by a sworn affidavit. Prior decisions of this Court make it manifestly clear that such a publication cannot be deemed to have been made with actual malice in the absence of "clear and convincing" evidence that the petitioner entertained serious doubts as to the truth at the time of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

ARGUMENT

THE RECORD BELOW IS VOID OF ANY EVIDENCE THAT THE DEFENDANT ENTERTAINED SERIOUS DOUBTS AS TO THE TRUTH OF THE PUBLICATION

Respondent's Brief in Opposition manifestly fails to demonstrate any evidence that the newspaper entertained serious doubts as to the truth of the article at the time of publication. Respondent argues instead that petitioner's failure to investigate further constitutes reckless disregard for the truth. This argument ignores this Court's clear pronouncement in *St. Amant* that "reckless conduct cannot be measured by whether a reasonable prudent man would have published, or would have investigated before publishing." 390 U.S. at 731.

Respondent cannot rebut the undisputed facts that the article was published as a result of charges by County Commissioner Knowles, the public official entrusted with overseeing the conduct of the correctional institution, accusing Deputy Warden DeBerry of misconduct in his official duties. Commissioner Knowles obtained the sworn affidavit of former inmate Hight and vouched for his credibility. Hight affirmed the truth of his affidavit in sworn testimony at trial below.

Commissioner Knowles initiated the article by approaching the newspaper, indicating that he had been called to the correctional institution only to be turned away by Respondent. He was later approached by Larry Hight, who indicated to Mr. Knowles that he had heard Mr. DeBerry repeat the quoted section of the article, to-wit: "Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." Thereafter, Mr. Knowles had Mr. Hight give an affidavit to this effect, which was sworn to and subscribed before attorney Wade C. Hoyt, III. Thereafter, this information was turned over to one of the Petitioner's reporters, Ms. Nanette Payne. Mr. Knowles gave Ms. Payne the information that he had been turned away by Mr. DeBerry when trying to get into the institution. The affidavit of Larry Hight was supplied to the petitioner with Mr. Knowles not only stating that the affidavit was true, but that another individual had told him that he had heard essentially

the same thing. Thereafter, Ms. Payne tried to repeatedly get Mr. Hight by telephone but was unsuccessful.

Based on these facts, which constitute the only information available to the defendants *at the time of publication*, the record is totally lacking in any evidence, let alone clear and convincing evidence, that the defendants entertained serious doubts as to the truth of the article at the time of publication.

Respondent's Brief in Opposition does not attempt to rebut this conclusion, or suggest additional facts *known* to the defendants at the time of publication. Respondent offers only those facts which were *not known* to the defendants at the time of publication, but were subsequently revealed at trial (i.e., that Hight allegedly removed a paint sprayer from the correctional institution, that Hight did not work in the vicinity of the rock crusher where the threatening statement was allegedly made, and that other Floyd County police officials would not believe Hight under oath).

What petitioner ignores is the critical and undisputed fact that the newspaper relied upon the assurances of Commissioner Knowles with respect to Hight's veracity. The newspaper additionally required a sworn affidavit from Hight prior to publication. The newspaper was entitled to rely upon this sworn statement, corroborated as it was by the County Commissioner.

Respondent argues that because the newspaper never interviewed Mr. Hight directly prior to publication, actual malice is thereby established. Brief in Opposition at 11-12. Relying on *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), Respondent argues that actual malice can be found where the story is based "wholly on an unverified anonymous telephone call." Brief in Opposition at 12. Respondent then asserts "reliance on Hight's affidavit, alone, under the circumstances of this case, was tantamount to relying on a wholly unverified anonymous telephone call." *Id.*

The analogy fails. Hight was clearly not anonymous, nor was his information "unverified." Hight's identity was revealed to the newspaper by Commissioner Knowles, who not only

identified him but, additionally, obtained his affidavit. The truth of the statement was also corroborated by Commissioner Knowles, who vouched for Hight's veracity and stated that he had investigated the story further, and believed it to be true. Far from relying upon an anonymous tip, the newspaper justifiably relied upon a sworn affidavit, and the investigation conducted by the County Commissioner.

Respondent's reliance upon *St. Amant, Supra,* is clearly misplaced. The facts of that case strongly support the petitioner. In *St. Amant,* this Court overturned a finding of reckless disregard by the Louisiana courts based upon the following findings of fact:

> St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.
>
> These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson.

St. Amant v. Thompson, 390 U.S. at 730.

The allegations against the defendant in *St. Amant* are virtually identical to the Respondent's version of the facts as set forth in the Brief in Opposition. Under both factual scenarios the publisher: (a) "had no personal knowledge of the [source's] activities;" (b) "relied solely upon [source's] affidavit;" (c) "failed to verify the information with those . . . who might have known the facts." *Id.*

St. Amant did not publish with actual malice, and neither did the *Rome News Tribune.* The latter *additionally* relied upon the investigation of a Floyd County Commissioner, and his

assurance of the source's veracity, while Phil St. Amant had no such corroboration when he mounted the rostrum to read from his source's affidavit.

None of the other authorities cited in the Brief in Opposition lend support to Respondent's argument that the facts of this case demonstrate clear and convincing proof of actual malice. Respondent attempts to cite Justice Harlan's minority opinion from *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-158 (1967) to support his position. Brief in Opposition at 8. The objective standard set forth in that opinion has never been adopted by this Court. *Fitzgerald v. Penthouse International, Ltd.*, 691 Fed. 2d 666 (4th Cir. 1982) and *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000 (S.D. N.Y. 1983) are similarly inapposite. Both cases involve denial of summary judgment prior to trial, and do not involve the Constitutional duty of courts to review the evidence as a whole following trial, as required by *Bose Corp. v. Consumers Union of the United States*, ___U.S.___, 82 L.Ed 2d 863 (1984).

From the foregoing it is clear that the Petitioner acted in good faith, relying from the outset upon representations of the County Commissioner and a sworn affidavit. There is no evidence whatever that the newspaper "entertained serious doubts about the truth at the time of publication."

In an effort to point out the inadequacies of the reporting in the case, Respondent asserts that the newspaper "departed from responsible standards of investigation and printed the story on the basis of an obviously unreliable source without further investigation." Brief in Opposition at 17. Respondent then cites the testimony of its expert witness to support this contention.

This recitation of purported journalistic standards is far from dispositive on the issue of actual malice. It constitutes an opinion that the newspaper may have been negligent in not investigating further under some objective or academic standard for "investigative journalism." The inquiry for this Court, however, is whether the newspaper in fact entertained serious doubts about the truth of the publication. Again, the record is utterly devoid of such a showing.

CONCLUSION

For the reasons stated above, and for the reasons stated in the Petition for Certiorari, we respectfully urge this Court to follow the mandate set forth in *Bose* and independently review the evidence on the issue of actual malice.

Respectfully submitted,

*ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY
& BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

GROZE MURPHY, JR.
SMITH, SHAW, MADDOX,
DAVIDSON & GRAHAM
First National Bank Building
Rome, Georgia 30163
(404) 291-6223

Attorneys for Petitioner

---

* Counsel of Record